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No. 91-680

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

PETITONERS REPLY TO THE BRIEF OF THE UNITED STATES

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No. 91-680

In the
SUPREME COURT OF THE UNITED STATES

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice president and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

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PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES

In response to the Court's invitation to comment on Fairway's petition for a Writ of Certiorari, the government has now submitted a Brief expressing the view that the issue raised by the Petition "is important" (U.S. Br. 4) and "there is disagreement among the circuits concerning the existence of a fiduciary's right to contribution under ERISA" (U.S. Br. 17). One might expect these views to be accompanied by unqualified support for the Petition. Remarkably, however, the government opposes certiorari.

In a case involving an important, purely legal issue upon which the circuits are divided, a negative recommendation from the government could only be justified by particularly weighty concerns of law or policy. But no such concerns are set forth in the government's Brief. Instead, this Court is urged to withhold consideration of this important, divisive, and recurring legal issue because one circuit "may find it appropriate to consider this issue en banc" (U.S. Br. 19, n.21), because a "consensus" may yet develop in the other circuits (U.S. Br. 19), and because a remand and trial may "shed light on the practical concerns that inform the question whether to recognize a federal common law right of contribution under ERISA" (U.S. Br. 20).

The makeweight character of these arguments strongly suggests that the real basis for the government's opposition to certiorari is the fear that a decision with which it agrees will be reversed by this Court. This is no reason to deny review; the government can and should be required to defend the judgment on the merits.

1. ***Conflict among the circuit courts.*** Begrudgingly, the government concedes the obvious: the majority decision below ("*Chemung*") conflicts with the Ninth Circuit's decisions in *Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989), and *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989).[1] The government argues, however, that this Court should ignore the issue until it has had a more "thorough examination" in the lower courts (U.S. Br. 19).

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[1] Indeed, legal periodicals have noted the split and have suggested the urgent need for the Court to resolve it. *See, e.g.*, "Chemung Canal Trust: Second Circuit Creates Conflict On Right of Contribution Among ERISA fiduciaries," *Tax Notes*, vol. 53, no. 10, p. 1169, 1172 (December 9, 1991) ("Hopefully, the petition for certiorari will be granted. The circuits are split and the contribution issue is fundamental to the fiduciary rules under ERISA."). *See also* "2d Circuit Recognizes a Right to Contribution Among Breaching Fiduciaries," ERISA Litigation Reporter, vol. 1, no. 4 (September-October, 1991) (noting that *Chemung* represents a minority view).

In fact, the conflict is far better developed than the government acknowledges. The Ninth Circuit is hardly the only jurisdiction in which ERISA defendants may not assert contribution claims. The Seventh Circuit in *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991), has ruled unambiguously that the courts have no authority to add new remedies to the ERISA scheme. The district courts in *Schloegel v. Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991), and *Hunt v. Magnell*, 766 F. Supp. 727 (D. Minn. 1990), have rejected a right of contribution, expressing confidence that the Fifth and Eighth Circuits, respectively, would do so. Other district courts in Alabama,[2] Illinois,[3] Maryland,[4] Minnesota,[5] New Jersey,[6] North Carolina,[7] South Carolina,[8] and Pennsylvania[9] have all rejected an ERISA right of contribution.

Some of these decisions rejected contribution on the ground that the remedy could not be "implied" from the policies and text of ERISA. Others, including *Call*, go further and hold that a contribution right cannot be "fashioned" as a matter of federal common law. But the government improperly minimizes the conflict by focusing principally on *Call* and *Chemung*. While the stated rationale for rejecting or permitting contribution claims is

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[2] *Hollingshead v. Burford Equipment Co.*, 747 F. Supp. 1421 (M.D. Ala. 1990).

[3] *Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596 (N.D. Ill. 1989).

[4] *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 696 (D. Md. 1990).

[5] *Physicians HealthChoice, Inc. v. Trustees of Automotive Employee Benefit Trust*, 764 F. Supp. 1360 (D. Minn. 1991).

[6] *McClendon v. Continental Group, Inc.*, 7 E.B.C. 2403 (D.N.J. 1986).

[7] *Brock v. Gillikin*, 677 F. Supp. 398 (E.D.N.C. 1987).

[8] *Franklin v. Aetna Life Insurance co.*, 10 E.B.C. 1022 (D.S.C. 1988).

[9] *Collini v. Wean United, Inc.*, 101 F.R.D. 408 (W.D. Pa. 1983).

of theoretical interest to lawyers and judges, all that matters to ERISA litigants is the result. The conflict is between courts that recognize a right of contribution and those that do not. This conflict is real, and it is widespread.

In any event, all these decisions — not only those that address "federal common law" arguments as *Call* did,[10] but decisions that reject "implied right" arguments as well — are in conflict with *Chemung* on analytical grounds. Technically, of course, the argument for "implied" rights of contribution is distinct from the argument for "federal common law" rights of contribution. Nevertheless, the "implied right" decisions conflict with *Chemung* because they reject its rationale. The *Chemung* majority held that Congress has directed the courts "to fashion ... a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence." A-35 to A-36. The decisions rejecting "implied" rights of contribution, on the other hand, uniformly hold that, because ERISA sets up such a comprehensive and interdependent remedial scheme, Congress did not intend to authorize judicial creation of contribution rights. *E.g., Mutual Life Ins. Co. of New York v. Yampol*, 706 F. Supp. 596, 598-600 (N.D. Ill. 1989); *Physicians HealthChoice, Inc. v. Trustees of Automotive Employee Benefit Trust*, 764 F. Supp. 1360, 1362-64 (D. Minn. 1991). In short, the "implied right" decisions are irreconcilable with *Chemung* because they reject its premise.

This conflict was expressly recognized by the Ninth Circuit in *Call*. Relying on *Massachusetts Mutual Life Ins. Co. v. Russell*, the Ninth Circuit had already refused to recognize an "implied"

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[10] Besides *Call*, decisions that address and reject "federal common law" arguments include *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991), *Schloegel v. Boswell*, 766 F. Supp. 563, 568 (S.D. Miss. 1991), and *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 696 (D. Md. 1990).

right of contribution under ERISA on the ground that Congress did not intend to provide or allow such a remedy. *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989). Undeterred, the defendants and the government (as *amicus curiae*) argued in *Call* that Congress *did* so intend. This time, however, they couched the argument in terms of the courts' power to create "federal common law." The *Call* court found that these arguments based on legislative intent had already been considered and rejected in *Kim*. (The government's Brief in *Call* in the Appendix is reproduced in the Petitioner's Appendix; see A-53 to A-62.) Virtually identical arguments based on legislative intent appear in the Brief submitted by the Solicitor General at the Court's invitation in the present case. These arguments undermine the foundations of this Court's decision in *Russell*.

2. ***The serious consequences of delay in resolving the contribution issue.*** The government urges delay to allow time for more lower courts to opine on the contribution issue. But it offers no clue as to what might be gained by more judicial renderings on the subject. There is no dispute that the issue is purely one of law. There have been a plethora of decisions at both the circuit court and district court levels. The government's Brief shows that it has well-considered views on the issue and can articulate the considerations that inform its views. It is respectfully submitted that petitioners likewise can thoroughly and capably present the available legal arguments against an ERISA right of contribu-

tion. No purpose will be served by waiting for still more courts to choose one position or the other.[11]

The government suggests that the Ninth Circuit "may find it appropriate to consider this issue en banc if it arises again in that circuit" (U.S. Br. 19, n.21), now that its decision in *Call* conflicts with a Second Circuit decision. Presumably, the government intimates, the Ninth Circuit would be influenced by the analysis of the majority decision below (even though, as already noted, the Ninth Circuit has already concluded that Congress did not intend to authorize new ERISA remedies). But en banc review could have been requested when *Call* itself was decided; at the time, *Call* was in conflict with the Seventh Circuit's decision in *Free v. Briody*, 732 F.2d 1131 (7th Cir. 1984) (effectively overruled by *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991)). If the Ninth Circuit did not rehear *Call* in light of the then-existing split in authority, there is no point in waiting for the issue to arise in the Ninth Circuit again.

Nor is there any reason to expect that either the Ninth Circuit or any other court will be overwhelmed by the force of the reasoning in *Chemung*, with its several analytical flaws. As one commentator has noted:

> The key part of the *Chemung* decision, and its main area of vulnerability, was its conclusion that the four-factor test in *Cort v. Ash* [422 U.S. 66, 45 L. Ed. 2d 26 (1975)] regard-

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[11] Indeed, the Solicitor General's hope that more circuit courts will weigh in on the contribution issue may go unfulfilled as ERISA plaintiffs react to existing law. As ERISA lawyer David S. Preminger points out in a letter reproduced as an appendix to this Brief (App. 3a-4a), plaintiffs whose claims involve nationwide ERISA plans will, for the most part, be able to take advantage of the no-contribution rule in the Ninth Circuit. The ERISA bar is acutely conscious of the state of the law, and as Mr. Preminger suggests, the *Chemung* decision will encourage forum-shopping. As noted below, Mr. Preminger is painfully aware of the implications of *Chemung* because he is counsel for plaintiffs in a significant case in which a large settlement has been derailed as a consequence of *Chemung*.

> ing when private rights of action should be implied "is an inappropriate tool for analyzing" contribution under ERISA .... The *Chemung* court asserted that contribution is not really a "right of action" but is really a "procedural device" for sharing losses among potentially liable parties. While that formulation has a nice ring to it, the non-ERISA Supreme Court cases on contribution expressly analyze contribution in terms of the *Cort v. Ash* test, noting the primacy of its first factor.

ERISA Reporter, supra note 1, at 4.

> Viewed from the actual facts of the *Chemung* case, it's hard to agree with the 2nd Circuit that a right to contribution does not "really" create a new right of action .... [I]t's not exactly right to say that contribution creates no right of action, when that's what has occurred in *Chemung*, or to glide by *Russell* and the anti-contribution authority from the Supreme Court. If we had to guess, we'd say that *Chemung* will stay in the minority ....

Id. at 5.

In light of the tenuous nature of the reasons it cites for delay, it is inappropriate for the government to brush aside the serious consequences of delay. Thousands of dollars have already been spent by fiduciaries and ERISA plans to litigate the issue of whether contribution is available — resources that could be better employed for retirement benefits for ERISA participants. This drain on the resources of employee benefit plans can be expected to continue so long as the issue remains unresolved.

3. ***The immediate and future impact of Chemung on the expense and complexity of ERISA litigation.*** As Fairway pointed out in its Petition, "[t]he result of the determination below will be to make ERISA litigation more drawn-out, expensive, complicated, and uncertain for the very class of persons ERISA was intended to benefit." Pet. 18. The lower court itself acknowledged the possibility "that injecting contribution claims into an

already complex area of litigation will only further complicate matters and build costs." Pet. App. A-36.

In its Brief, however, the government maintains that a contribution rule may actually "assist plaintiffs in proving their case" and may actually facilitate settlements![12] U.S. Br. 11-12. In the short time since the decision in *Chemung,* experience has already shown that this is not so. Driven by *Chemung*, the Second Circuit has now ruled that the availability of contribution precludes district courts from approving the settlement of Department of Labor enforcement actions for fiduciary breaches unless there has been an evidentiary hearing in which all parties with claims have an opportunity to participate. *In re Masters Mates & Pilots Pension Plan & IRAP Litigation*, 957 F.2d 1020 (2d Cir. 1992). In these "mini-trials," district courts will be required to evaluate the relative fault of the defendants and to determine that the settlement adequately compensates non-settling parties for their lost rights of contribution. *Id.* at 1031-32.

The *Masters Mates & Pilots* decision frustrated a class action settlement that would have provided over $20 million to a pension plan for losses incurred as a result of risky investments by breaching fiduciaries. Prosecuted by the Department of Labor as well as by private plaintiffs, the case was settled "after years of complex and protracted litigation." *Id.* at 1023. Counsel for the private plaintiffs in that case — who support the Petition in the present case — notes:

> Absent the [contribution] claims raised by the defendants,

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[12] As if common sense alone does not reveal that this is not a serious proposition, the present case shows how contribution claims inhibit the possibility of settlement. After being sued, respondent Sovran Bank not only sued petitioner Fairway as the plan sponsor, but brought a counterclaim against Chemung Canal Trust Company, whose sole involvement with the plan assets came after all losses had been incurred and whose only crime, so far as Sovran was concerned, was in suing Sovran.

> the trial of the matter (absent a settlement) would have been long since concluded. The class of plaintiffs in [*Masters Mates & Pilots*], as with most ERISA actions, includes numerous elderly individuals as well as the beneficiaries of those who have already died. Expeditious litigation is a prime concern for retired participants and beneficiaries.

Letter, David S. Preminger, Esq. to Christopher Wright, Esq., April 7, 1992 (appended to this Brief, App. la to 4a).[13] Counsel properly attributes the undue protraction of his case directly to *Chemung* and the contribution issue. App. 3a.

Not only plaintiffs, but ERISA defendants as well, are already feeling the impact of *Chemung* and its offspring, the *Masters Mates & Pilots* decision. Counsel for one defendant reports that *Chemung* has frustrated an agreed settlement of his case "and has caused our client and his insurance carrier to remain subject to the uncertainties and expenses of further litigation." He predicts "a similar chilling effect on settlements" in other cases as well. App. 7a.

Counsel for another defendant in the same case correctly observes that *Chemung* and *Masters Mates & Pilots* have "spawned an entire new class of litigation regarding the effect of settlements upon outstanding cross-claims." App. 10a. The fact is that merely recognizing a right of contribution opens the door to a host of related questions. What is the rule when fiduciaries are not equally at fault? What is the proper allocation formula? When is it proper to find indemnification instead of contribution? What is the scope of the right of contribution? These thorny issues, all of which the government identified in its Brief, will now occupy the time and energies of the courts of the Second Circuit.

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[13] Indeed, no end is yet in sight for the *Masters Mates & Pilots* settlement. Although the Second Circuit ruled that a "fairness" hearing was required, it stated: "However, we decline to delineate either the requirements or all of the appropriate considerations for the hearing." 957 F.2d at 1032.

In its Brief, the government ignores the manner in which the Department of Labor's attempt to settle *Masters Mates & Pilots* was frustrated as a result of *Chemung*. Instead, the government cites two 50-year old law review articles whose authors felt that more liberal contribution rules might actually have a salutary effect on settlement of litigation. U.S. Br. 11 n.12. Writing when the modern Federal Rules were in their infancy, these commentators perforce had not witnessed the staggering increase in complex, protracted federal cases that has occurred in the last 50 years. *See, e.g., Ginett v. Computer Task Group, Inc.*, 1992 WL 83272, p. 9 (2d Cir. decided April 21, 1992).

No contemporary litigator would predict, with a straight face, that *Chemung* would facilitate either the prosecution of ERISA fiduciary claims or their settlement. Concerns about the increased complexity and expense of ERISA litigation, about additional burdens on the courts, and about impediments to settlement militate heavily in favor of immediate review by this Court.

4. ***The power of the courts to "fashion" ERISA rights and remedies as a matter of federal common law.*** This Court has never held that the courts may "fashion" federal common-law rights under ERISA, and the government does not argue otherwise.[14] Instead, the government offers this chain of reasoning: (a)

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[14] The government relies, instead, on this Court's general comments in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 92 (1989), concerning the need for the federal courts to develop ERISA common law. But the Court in *Firestone* was not called upon to "fashion" ERISA common law, and its decision contains none of the analysis of ERISA's remedial scheme that would have been a prerequisite (*see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981)) to a finding that the federal courts were free to do so. There is no doubt, of course, that the federal courts may properly resort to "federal common law" in *construing* ERISA. But the government's Brief all but ignores the critical differences between the "interpretation" and the "fashioning" aspects of federal common-law-making.

Clearly the courts are allowed to "fashion" federal common-law rules in the field of admiralty; (b) the LMRA has been said to be analogous to admiralty with respect to the need for judge-made rules of decision; (c) ERISA Section 502(a) has been said to be patterned after LMRA Section 301; (d) the courts are therefore authorized to "fashion" common-law rules under ERISA. U.S. Br. 14-16.

This simplistic syllogism is flawed because it ignores altogether the limitations this Court has recognized on the authority to fashion federal common law rules in the first place. The government itself concedes that federal courts "lack general authority to fashion rules of federal common law." U.S. Br. 12. Formerly, for example, federal courts were generally empowered to "fashion" rules of admiralty law — but that was so because *Congress had left to the courts* the responsibility for developing those rules. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 10 L. Ed. 2d 720, 724 (1963). This is no longer unqualifiedly so, however, because Congress has restricted judicial prerogatives by legislating extensively and specifically in admiralty law. *Miles v. Apex Marine Corp.*, 498 U.S. __, 112 L. Ed. 2d 275, 287 (1990)[15] Similarly, the courts may fashion federal common law under the LMRA — but that is so because in certain cases Congress has created a right and left it to the courts to fashion the extent of the right or its remedy. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. Ed. 2d 972 (1957). Similarly, it is "unmistakably clear" that Congress left it to the courts to fashion rules for *substantive* violations of sections 1 and 2 of the Sherman Act — but Congress has, on the other hand, provided *detailed, specific remedial provisions* that preclude any authority "to alter or supple-

[15] Moreover, "even in admiralty" this Court has declined to fashion new remedies if there is a possibility that they might interfere with a legislative program. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981).

ment the remedies enacted." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642-45, 68 L. Ed. 2d 500, 510-12 (1981).

This Court has thus made it clear that the authority to "fashion" federal common law depends on the intent of Congress, and that its intent can best be divined by evaluating particular statutory schemes. The courts are not authorized to fashion federal common law in cases where Congress has laid out "a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 767 (1981). Indeed, there is a presumption, in cases of "comprehensive legislative schemes," that Congress deliberately left out any rights or remedies that were omitted. *Id.; accord, Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 106 (1984); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645, 68 L. Ed. 2d 500, 512 (1981).

At its heart, therefore, the authority of the courts to fashion a right of contribution turns on whether ERISA constitutes a "comprehensive legislative scheme" containing specific, detailed remedies. The Brief of the government dances around this issue and fails to address it. This Court, however, has already described the remedial provisions of ERISA as an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' " *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 87 L. Ed. 2d 96, 106 (1984). The government suggests no reason why, given ERISA's existing statutory remedial scheme, the presumption against unspecified rights should not be applied to preclude a "federal common law" right of contribution under ERISA.

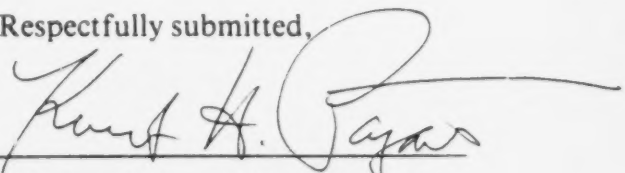
In any event, the issue is clearly ripe for review by this Court at this time; delay will not enhance the Court's ability to evaluate this legislative scheme to determine Congress's intent. Delay will lead to wasteful litigation and can only reduce the resources available to employees. Because the government has offered no compelling reason to justify this waste, the Court should decide the issue now.

Conclusion

For the reasons set forth above and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

June 1, 1992

Respectfully submitted,



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APPENDIX

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BY FEDERAL EXPRESS

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Re: *Fairway Spring Co., Inc., et al. v. Sovran Bank/Maryland*
Petition No. 96-680

Dear Mr. Wright:

We are writing in support of the petition for a writ of *certiorari* in the referenced matter. We believe it to be extremely important that the United States Supreme Court resolve the conflict in the circuits which has resulted from the Second Circuit's recent decision in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991).

We are liaison counsel for the class of private plaintiffs in *Cullen, et al. v. Lowen, et al.*, 87 Civ. 1798 (VLB), S.D.N.Y. ("Cullen"). *Cullen* is an ERISA action against the trustees of the International Organization of Masters, Mates and Pilots Pension

APPENDIX

Plan and Individual Retirement Account Plan (the "Plans") and a former investment manager of the Plans, Tower Asset Management, Inc. ("Tower"). In essence the private plaintiffs in *Cullen* (the Secretary of Labor subsequently filed a similar action which was consolidated with *Cullen*) allege that (i) Tower was unqualified to be an investment manager for an ERISA plan and should never have been hired, (ii) Tower engaged in illegal and imprudent investments which lost the Plans millions of dollars (*see* 829 F.2d 1209 (2d Cir. 1987)) and (iii) the trustees, *inter alia,* failed to monitor Tower thereby enabling the illegal and imprudent investments. It is estimated that losses exceed $50 million.

Cullen was commenced in April 1986. Discovery has included approximately 70 fact depositions occupying about 200 days, 1800 marked deposition exhibits, numerous sets of expert interrogatories as well as expert depositions and voluminous motion practice. In the spring of 1989, at the conclusion of fact discovery, the defendant trustees commenced actions for contribution and indemnity against the Plans' attorneys and auditors. While motions to dismiss such claims were made *inter alia* on the ground that ERISA precluded such claims, fact discovery was, of course, recommenced.

In June 1991, plaintiffs and most defendants entered into a settlement agreement. Because the settling defendants naturally insisted on finality, the settlement agreement included a "bar order" which barred the non-settling defendants' (including one trustee) claims against the settling defendants. Because the weight of authority at the time held that ERISA precluded claims for contribution and indemnity, the bar order seemed, for the most part, unassailable, at least until the *Chemung* decision.

The District Court upheld the settlement agreement, including its bar order provisions, as written, but the Second Circuit re-

versed certain aspects of the settlement. *Cullen, et al. v. Riley,* Nos. 91-6276, 91-6288 (2d Cir., February 21, 1992). (A copy of this decision is enclosed for your information.) While settling parties are currently in the process of revising the settlement agreement to comply with Second Circuit's decision, it is obvious that this litigation has become excessively protracted (i) because of the uncertainty of the viability of the claims for contribution and indemnification which required third party fact discovery to proceed while the motions to dismiss these claims were pending, (ii) because of the *Chemung* decision and (iii) because of the reversal of the bar order in light of *Chemung.*

We support the petition for *certiorari* in general because the doubt about the availability of claims for contribution and indemnity will continue to exist until the split in the circuits has been resolved. We also support the petition for the reasons expressed at pp. 15-18 thereof regarding greater expense and efforts for plaintiffs.

As already noted, *Cullen* has been in litigation for six years. Absent the claims raised by the defendants, the trial of that matter (absent a settlement) would have been long since concluded. The class of plaintiffs in *Cullen,* as with most ERISA actions, includes numerous elderly individuals as well as the beneficiaries of those who have already died. Expeditious litigation is a prime concern for retired participants and beneficiaries.

Another reason for granting the writ is ERISA's intent of fashioning a *uniform,* nationwide pension law. It is absurd to contemplate that the existence of claims for contribution and indemnity will depend on the circuit in which litigation is commenced. Especially with respect to nationwide plans, such as the Plans involved in *Cullen*, litigation could be commenced in any state. It is

merely happenstance that *Cullen* is pending in New York instead of California.

In order to eliminate the possibility of forum shopping and to remove the doubt which continues to pervade actions in which claims for contribution and indemnity have been or may be raised, we urge that you recommend that the Supreme Court grant the writ in the referenced matter.

Very truly yours,

s/ David S. Preminger
David S. Preminger

DSP:aes
Enc.

APPENDIX

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March 19, 1992

BY EXPRESS MAIL

Christopher Wright, Esq.
Assistant Solicitor General
Department of Justice
Main Justice Building
10th & Pennsylvania, N.W.
Washington, DC 20530

Re: *Fairway Spring Co., Inc., et. al. v. Sovran Bank/Maryland*
Peition No. 91-680

Dear Mr. Wright:

We are writing in support of the petition for a writ of *certiorari* in the above-captioned matter. We are strongly in favor of the petition, as we feel it is imperative that the United States Supreme Court resolve the tremendous doubt and uncertainty stemming from the Second Circuit's recent decision in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2nd Cir. 1991).

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We are currently defending an action pending before the Honorable Michael B. Mukasey in the United States District Court, Southern District of New York, under case number CV 87-1046. The action was commenced by the Pension Benefit Guaranty Corporation ("PBGC") to recover damages for alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. section 1001, *et seq.*, in connection with the termination of a pension plan and an alleged unlawful removal of plan assets. Various individuals and entities have been sued by the PBGC, and a number of cross-claims have been asserted. Our client is an insurance broker who helped arrange for the purchase of an annuity contract in connection with the termination of the plan.

After almost four years of extensive discovery, involving numerous depositions, document productions, and motions, the PBGC agreed to a settlement of its claims against our client and one other defendant, conditioned, however, on the dismissal of all cross-claims. The PBGC's claims against the other defendants remain outstanding.

In light of the numerous cases in which the Courts have held that there is no right of contribution or indemnification under ERISA, we moved to dismiss all outstanding cross-claims. Based on these decisions, we anticipated that the Court would grant our motion and that we would therefore be able to proceed with the settlement.

Unfortunately, when our motion was conferenced before the Court, Judge Mukasey stated that he had been prepared to dismiss the cross-claims on the ground that there is no right of contribution or indemnification under ERISA, but that he had just received a copy of the Second Circuit's decision in *Chemung*. As you know, the Court in *Chemung*, for the first time in any juris-

diction, held that there is a right of contribution and indemnification under ERISA as a matter of federal common law. Judge Mukasey disagreed with the Second Circuit's decision on the record, but stated that he is bound to follow the higher court's determination.

As a result of the decision in *Chemung*, we have been unable to proceed with the settlement of the PBGC's claims against our client. We have also been compelled to engage in further motion practice, arguing that a "settlement bar" rule, such as that embodied in section 15-108 of New York's General Obligations Law, should be incorporated into ERISA as a matter of federal common law as well, should the decision in *Chemung* not be overturned. Needless to say, the *Chemung* decision has prevented us from consummating the agreed upon settlement with the PBGC, and has caused our client and his insurance carrier to remain subjected to the uncertainties and expenses of further litigation. Moreover, we have no doubt that the *Chemung* decision will have a similar chilling effect on settlements and give rise to substantial litigation in other cases as well.

The Second Circuit's decision in *Chemung* is contrary to the Ninth Circuit's decision in *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989), as well as the numerous other decisions in which ERISA's language and legislative history have been interpreted as providing remedies intended *solely* for the benefit of employee benefit plans (and their participants and beneficiaries) — not alleged wrongdoers. The *Chemung* decision is also inconsistent with the Supreme Court's repeated holdings concerning the circumstances under which federal common law should be fashioned. It should also be noted that the Second Circuit did not hear the *Chemung* appeal *en banc*, and that there was a dissenting opinion from Circuit Judge Altimari, one of the three judges who participated in the appeal.

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We, too, believe that the *Chemung* decision is incorrect. Quite simply, the doubt and uncertainty resulting from that decision has created an intolerable situation in our case, and will no doubt cause problems in numerous other cases as well.

For the foregoing reasons, we ask that you strongly recommend that the Supreme Court hear the appeal in the above-captioned matter.

Very truly yours,
MARTIN, CLEARWATER & BELL

Kenneth R. Larywon

KRL:DLK

APPENDIX

JACKSON & NASH
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March 24, 1992

BY EXPRESS MAIL

Christopher Wright, Esq.
Assistant Solicitor General
Department of Justice
Main Justice Building
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Fairway Spring Co., Inc., et al. v. Sovran Bank/ Maryland
Petition No. 91-680

Dear Mr. Wright:

We are writing to urge your support of the petition for a writ of *certiorari* in the above-entitled matter. Like Kenneth R. Larywon, Esq. of Martin, Clearwater & Bell, who wrote a letter to you dated March 19, 1992, we believe it is extremely important for the United States Supreme Court to resolve the conflict that now exists among the Circuit Courts of Appeals as to whether cross-claims are permissible under ERISA, as a result of the decision by the Second Circuit Court of Appeals in *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991).

We represent the other settling defendant in the case described by Mr. Larywon, and we support the petition for all of the reasons which are stated in his letter. Because those reasons have already been clearly expressed, we don't believe there is any reason to repeat them here. However, we believe that a recent decision by

the Second Circuit Court of Appeals, which was not yet known to the New York bar on the date of Mr. Larywon's letter, has provided one more reason to support this petition, and made it even more imperative for the Supreme Court to resolve the existing conflict.

In a case entitled *In re Masters, Mates and Pilots Pension Plan and IRAP Litigation,* Docket Nos. 91-6276, 91-6288 (2d Cir. Feb. 21, 1992), the Second Circuit held that a settlement by one or more defendants of claims asserted under ERISA cannot extinguish the contribution or indemnity rights of third parties, at least where such rights have been asserted by cross-claim in the same action, unless and until an "evidentiary fairness hearing" is conducted and the District Court's approval is given. The court further indicated that approval could be given only after due consideration of a variety of pertinent factors, but it declined to specify what factors had to be considered. (A copy of the said decision is enclosed herewith.)

Thus, the Second Circuit's decision in the *Chemung* case has, predictably, spawned an entire new class of litigation regarding the effect of settlements upon outstanding cross-claims. Furthermore, the "fairness hearings" which have now been mandated by the *Masters, Mates and Pilots* decision will (a) impose a new burden upon the district courts, whose calendars are already heavily congested; (b) force parties to undergo additional expense and uncertainty of litigation, even after a putative settlement is reached; and (c) necessarily have a chilling effect on the settlement of ERISA claims, which would otherwise benefit pension plan participants.

Most importantly, for the purposes of the petition that you are now considering, all of these adverse effects may be entirely unnecessary. If the Supreme Court were to reject the reasoning of the

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Second Circuit in *Chemung* in favor of that employed by the Ninth Circuit Court of Appeals in *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989) and *Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989), and hold that there is no right to assert cross-claims under ERISA, the need for collateral litigation and "fairness hearings" would disappear, with all of their attendant uncertainty, expense and delay.

Accordingly, for the reasons set forth above as well as those that are contained in Mr. Larywon's letter to you dated March 19, 1992, we respectfully suggest that you recommend issuance of a writ of *certiorari* in the above-noted proceeding.

Very truly yours,

s/ CSR
Christopher S. Rooney

CSR/jml
Enclosure

cc: Kenneth R. Larywon, Esq. (By telecopier)